A

CHAN BOI LOI

v.

PUBLIC BANK BHD & ANOTHER APPLICATION

B

FEDERAL COURT, PUTRAJAYA
ZAKI TUN AZMI CJ
ZULKEFLI MAKINUDIN FCJ
GOPAL SRI RAM FCJ
[CIVIL APPLICATION NOS: 08-243-2007(C) &
C 08-245-2007(C)]
9 SEPTEMBER 2009
[2009] CLJ JT(6)

BANKING: *Banks and banking business - Action against borrower for*
D *recovery of moneys secured by charge - Action commenced before sale of land under charge - Whether bank entitled to do so - Whether action to be commenced only after sale of land and shortfall produced - Whether bank entitled to pursue all remedies available against borrower - Hong Kong & Shanghai Banking Corp Ltd v. Wan Mohd Wan Ngah - Tan*
E *Kong Min v. Malaysian National Insurance Sdn Bhd - Low Lee Lian v. Ban Hin Lee Bank Bhd*

CIVIL PROCEDURE: *Action - Action against borrower for recovery of moneys secured by charge - Action commenced before sale of land under*
F *charge - Whether bank entitled to do so - Whether action to be commenced only after sale of land and shortfall produced - Whether bank entitled to pursue all remedies available against borrower - Hong Kong & Shanghai Banking Corp Ltd v. Wan Mohd Wan Ngah - Tan Kong Min v. Malaysian National Insurance Sdn Bhd - Low Lee Lian v. Ban*
G *Hin Lee Bank Bhd*

The respondent bank commenced an action *in personam* against the applicants respectively for recovery of moneys secured by charge. The applicants claimed that the respondent was precluded from bringing the action up until the lands under the charge were sold
H by virtue of cls. 8 and 16 of their respective annexures to the charge ('cls. 8 and 16'). The High Court decided in favour of the applicants and dismissed the respondent's action. The respondent appealed to the Court of Appeal that allowed the appeal by a majority and reinstated the action. The applicants now sought
I leave to appeal principally on the ground that the decision of the

Court of Appeal was contrary to established precedent, *ie*, *Hong Kong & Shanghai Banking Corp Ltd v. Wan Mohd Wan Ngah ('Hong Kong & Shanghai Banking Corp Ltd')* and *Tan Kong Min v. Malaysian National Insurance Sdn Bhd ('Tan Kong Min')*.

Held (dismissing the applications)
Per Gopal Sri Ram FCJ delivering the judgment of the court:

(1) In the case of *Tan Kong Min*, the only points that called for decision were (1) when the insurance company's cause of action to recover the shortfall arose, and (2) which period of limitation was to be applied, *ie*, whether the six years prescribed by s. 6 of the Limitation Act 1953 or the 12 years prescribed by s. 21 of the same Act. The following observation made "where the respondent is also a chargee of the property and the only terms that bind the parties are the terms set out in the annexure to the charge, the respondent is not entitled at law and equity to proceed by way of a civil suit before first realizing the security under the charge" was pure *obiter dicta* and not part of the *ratio decidendi*. It was not to be treated as binding authority. The case of *Tan Kong Min* was an action to recover a shortfall that had occurred after the sale of the security. It was not an action for the recovery of a debt due from the borrower to the lender. (para 7)

(2) The decision in *Hong Kong & Shanghai Banking Corp Ltd* was clearly overtaken by the decision of this court in *Low Lee Lian v. Ban Hin Lee Bank Bhd*. Therefore, *Hong Kong & Shanghai Banking Corp Ltd* must now be regarded as overruled. (para 7)

(3) A lender is entitled to pursue all remedies available against a borrower simultaneously, contemporaneously or successively to recover the moneys lent unless there is an agreement to the contrary. Such an agreement is not to be implied from the terms of a clause as stated in cls. 8 and 16. All that a clause in those terms did was to create a right in the lender to recover the balance outstanding in the event a sale of the charged property produced a shortfall. (para 8)

(4) Clauses 8 and 16 were not to be read as an agreement by the respondent to postpone its right to bring an action *in personam* for the recovery of the whole sum lent (together with interest) until after the charged land had been sold. If the

courts were to read such an agreement into the said clauses, it would amount to an unwarranted restriction on a lender's right to seek the remedies open to it. If the land never got sold despite all attempts to do so, the borrower would get away scot-free from making any payment. His answer to any action by the lender upon the covenant to pay would be that it was a condition precedent that the land be sold and a shortfall produced before any suit might be instituted. The want of logic in that proposition was sufficient to demonstrate that it was not common sense and not the common law. (para 8)

(5) The applicants argued that the annexure to each charge was the only contract between the parties and that the respondent had no alternative but to follow its terms and resort to enforcing the security before suing on the debt. That argument was devoid of merit. There were two contracts of loan as evidenced by two letters of offer, the terms of which were accepted by the applicants. The letters were both dated 18 June 1982. One was in respect of an overdraft and the other for a term loan. Those letters contained terms that were not to be found in the respective annexures. They therefore stood independently as separate contracts of debt, the breach of which entitled the respondent to bring the action. (para 9)

Bahasa Malaysia *Translation Of Headnotes*

Responden bank telah memulakan satu tindakan *in personam* terhadap pemohon-pemohon bagi mendapat kembali sejumlah wang yang dijamin oleh suatu gadaian. Pemohon-pemohon berhujah bahawa responden tidak berhak untuk membawa tindakan sedemikian kecuali setelah tanah-tanah di bawah gadaian berkenaan dijual berdasarkan peruntukan fasal-fasal 8 dan 16 annexure kepada gadaian ('fasal 8 dan 16'). Mahkamah Tinggi memutuskan dengan berpihak kepada pemohon-pemohon sekaligus menolak tindakan responden. Responden merayu ke Mahkamah Rayuan di mana mahkamah tersebut membenarkan rayuan dengan keputusan majoriti dan sekaligus menghidupkan semula tindakan. Pemohon-pemohon kini memohon kebenaran untuk merayu, secara pentingnya atas alasan bahawa keputusan Mahkamah Rayuan adalah bertentangan dengan tauladan-tauladan terpakai seperti

Hongkong & Shanghai Banking Corp Ltd v. Wan Mohd Wan Ngah ('Hongkong & Shanghai Banking Corp Ltd') dan *Tan Kong Min v. Malaysian National Insurance Sdn Bhd* ('Tan Kong Min'). A

Diputuskan (menolak permohonan-permohonan)
Oleh Gopal Sri Ram HMP menyampaikan penghakiman mahkamah: B

(1) Di dalam kes *Tan Kong Min*, soal perkara yang perlu diputuskan hanyalah (1) bilakah kausa tindakan syarikat insurans untuk menuntut hutang yang masih berbaki berbangkit, dan (2) tempoh had masa manakah yang perlu digunapakai, sama ada enam tahun seperti yang ditetapkan oleh s. 6 Akta Had Masa 1953 atau pun 12 tahun yang ditetapkan oleh s. 21 Akta yang sama. Pandangan yang dibuat berikut, "di mana responden juga seorang pemegang gadaian hartanah dan satu-satunya terma yang mengikat pihak-pihak adalah terma-terma yang dibentangkan di dalam annexure kepada gadaian, maka responden tidak berhak di sisi undang-undang dan ekuiti untuk bertindak melalui tindakan sivil sebelum terlebih dahulu merealisasikan jaminan di bawah gadaian" adalah semata-mata *obiter dicta* dan bukan merupakan sebahagian dari *ratio decidendi*. Maka ia tidak harus diambil sebagai autoriti yang mengikat. Kes *Tan Kong Min* pula adalah satu tindakan untuk menuntut hutang berbaki yang wujud selepas penjualan jaminan. Ia bukan satu tindakan untuk menuntut kembali hutang yang terhutang dari peminjam kepada pemberi pinjaman. C D E F

(2) Keputusan di dalam *Hongkong & Shanghai Banking Corp Ltd* jelas telah dihakis oleh keputusan mahkamah ini di dalam *Low Lee Lian v. Ban Hin Lee Bank Bhd.* Oleh itu, *Hongkong & Shanghai Banking Corp Ltd* hendaklah kini dianggap sebagai telah ditolak. G

(3) Seorang pemberi pinjaman berhak untuk menggunakan segala remedi yang ada secara serentak, bersekali mahupun berturut-turut bagi mendapatkan kembali wang yang dipinjamkan kecuali wujud perjanjian sebaliknya. Perjanjian sedemikian tidak boleh diandaikan dari terma sesuatu fasal seperti yang tercatit di dalam fasal 8 dan 16. Apa yang dibuat oleh fasal sedemikian H I

A adalah membentuk suatu hak kepada pemberi pinjaman untuk menuntut kembali jumlah tertunggak jika penjualan hartanah yang digadai meninggalkan baki yang masih terhutang.

(4) Fasal 8 dan 16 tidak harus dibaca sebagai perjanjian oleh
B responden untuk menangguhkan hak-haknya untuk membawa tindakan *in personam* bagi mendapat kembali keseluruhan jumlah yang dipinjamkan (beserta dengan faedah) sehingga selepas tanah yang digadai telah dijual. Jika mahkamah membaca perjanjian sedemikian ke dalam fasal tersebut, ia akan menjadi
C satu halangan tidak wajar terhadap hak pemberi pinjaman untuk menggunapakai remedi-remedi yang terbuka baginya. Jika tanah tidak berjaya dijual walaupun segala percubaan telah dibuat untuk menjualnya, maka peminjam akan terlepas begitu sahaja tanpa perlu membuat apa-apa pembayaran. Jawapannya
D terhadap sebarang tindakan pemberi pinjaman supaya pembayaran dibuat berdasarkan kovenan adalah bahawa menjadi satu syarat duluan bahawa tanah harus dijual dan baki yang terhutang dibuktikan sebelum apa-apa tindakan boleh diambil. Ketiadaan logik dalam hujah sedemikian adalah
E mencukupi untuk menunjukkan bahawa itu bukan 'common sense' dan bukan juga 'common law'.

(5) Pemohon-pemohon berhujah bahawa annexure kepada setiap gadaian adalah satu-satunya kontrak di antara pihak-pihak dan
F bahawa responden tiada pilihan melainkan menuruti terma-terma tersebut dan harus pula menguatkuasakan jaminan disitu sebelum membuat tuntutan hutang. Hujah ini tidak bermerit. Terdapat dua kontrak pinjaman seperti yang terbukti dari wujudnya dua surat tawaran, terma-terma mana telah pun
G diterima oleh pemohon-pemohon. Kedua-dua surat adalah bertarikh 18 Jun 1982. Satu adalah berkaitan overderaf sementara satu lagi berkaitan dengan pinjaman berterma. Surat-surat tersebut mengandungi terma-terma yang tidak didapati di dalam annexure-annexure berkenaan. Surat-surat tersebut,
H dengan itu, berdiri sebagai kontrak hutang yang bebas, dan pelanggarannya memberi hak kepada responden untuk membawa tindakan.

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Case(s) referred to:

Allied Capital Sdn Bhd v. Mohamed Latiff Shah Mohd & Another Application [2001] 2 CLJ 253 FC ***(refd)***

Beatrice Fernandez v. Sistem Penerbangan Malaysia & Anor [2005] 2 CLJ 713 FC ***(refd)***

Datuk Syed Kechik Syed Mohamed v. The Board of Trustees of the Sabah Foundation [1999] 1 CLJ 325 FC ***(refd)***

Hong Kong & Shanghai Banking Corp Ltd v. Wan Mohd Wan Ngah [1991] 1 CLJ 821; [1991] 2 CLJ (Rep) 732 HC ***(ovrd)***

Leong Yick Realty Co Sdn Bhd v. Asia Commercial Finance (M) Sdn Bhd [1994] 2 CLJ 530 ***(refd)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(foll)***

Tan Kong Min v. Malaysian National Insurance Sdn Bhd [2005] 3 CLJ 825 FC ***(dist)***

Legislation referred to:

Limitation Act 1953, ss. 6, 21

(Civil Application No: 08-243-2007(C))

For the applicant - Bastian Vendargon; M/s Bastian Vendargon

For the respondent - Vignesh Kumar Krishnasamy (Muzamil Alif Mohamad with him); M/s Balendran Chong & Bodi

(Civil Application No: 08-245-2007(C))

For the applicants - Mura Raju; M/s Mura Raju & Co

For the respondent - Vignesh Kumar Krishnasamy (Muzamil Alif Mohamad with him); M/s Balendran Chong & Bodi

Reported by Usha Thiagarajah

JUDGMENT

Gopal Sri Ram FCJ:

[1] These are two applications for leave to appeal against the decision of the Court of Appeal which (by a majority) dismissed the applicants' appeal to it. Ordinarily this court does not give reasons when allowing or dismissing applications of this nature. This is encapsulated in the following observation by Edgar Joseph Jr FCJ in *Datuk Syed Kechik Syed Mohamed & Anor v. The Board of Trustees of the Sabah Foundation* [1999] 1 CLJ 325, 330:

> It is not the practice of this court, nor as we understand it, the practice of the House of Lords, when sitting in its judicial capacity hearing application for leave to appeal, to give explicit reasons for granting or refusing leave, save in circumstances where their Lordships considered that they had no jurisdiction to entertain the application.

But there are some cases in which this has been done. See, for example, *Beatrice Fernandez v. Sistem Penerbangan Malaysia & Anor* [2005] 2 CLJ 713; *Allied Capital Sdn Bhd v. Mohamed Latiff Shah Mohd & Another Application* [2001] 2 CLJ 253. We consider this an appropriate case to give reasons because it raises an issue of construction of certain clauses in an annexure to the charge that appeared with frequency in the 1980's and 1990's but no longer do. The common factual matrix upon which these applications are based is as follows.

[2] The respondent is a bank. It lent monies to the applicants. The loans were secured by two registered charges. Each charge has an annexure. It contains the following clause which is numbered as 8 in one annexure and as 16 in the other:

> If the amount realised by the Bank on a sale of the Said Land under the provisions of the National Land Code after deduction and payment from the proceeds of such sale of all fees dues costs rents rates taxes and other outgoing on the Said Land is less than the amount due to the Bank and whether at such sale the Bank is the purchaser or otherwise the Chargor(s) shall pay to the Bank the difference between the amount due and the amount so realised and until payment will also pay interest on such balance at the Prescribed Rate as aforesaid with monthly rests.

[3] The applicants' case before the High Court was based on this clause. According to them, this clause on its true construction precludes the respondent bank from bringing an action on the covenant to repay the loan until it has sold off the charged lands and then only in the event of a shortfall. In other words, the respondent bank agreed take foreclosure proceedings to have the lands sold off before enforcing the applicant's promise to repay the loan. In the present case, the bank commenced an action against the applicants' on their personal covenant before proceeding under the charges. This it was not entitled to do.

[4] The applicants resisted the respondent bank's action on the above amongst other grounds. The High Court however agreed with the applicants on the foregoing ground and dismissed the action without touching upon the other points. The bank appealed and the Court of Appeal by a majority allowed the appeal and reinstated the suit. The applicants have now come before us seeking leave to appeal principally on the ground that the decision of the Court of Appeal is contrary to established precedent. Two decisions were relied upon. The first is *Hong Kong & Shanghai Banking Corp v. Wan Mohd Wan Ngah* [1991] 1 CLJ 821; [1991] 2 CLJ (Rep) 732 where the facts were these. The plaintiff bank in that case sought the determination of the question whether being also the chargee of property it is "entitled at law and in equity to proceed by way of a civil suit before first realising the security under the charge and if so, whether the plaintiff is entitled to proceed concurrently on all his remedies". The High Court answered that question in the negative and stayed the plaintiff's suit on the ground that it was an abuse of the court's process. In doing so Lamin J (as he then was) relied on cl. 8 of the charge annexure in that case which read as follows:

> If the amount realized by the chargee on a sale of the said land under the provisions of the National Land Code after deduction and payment from the proceeds of such sale of all fees dues costs rents rates taxes and other outgoings on the said land is less than the amount due to the chargee and whether at such sale the chargee is the purchaser or otherwise the chargor(s) shall pay to the chargee the difference between the amount due and the amount so realized and until payment will also pay interest on such balance at the prescribed rate as aforesaid with monthly rests.

He then went on to say this:

> If the chargor shall make default in respect of any of the provisions in cl 6 then in any of such case the loan etc for the time being under the charge shall immediately become payable and the chargee shall forthwith be entitled to recover the same 'and to exercise the rights and powers upon default herein this charge'. If the amount realized by the chargee on the sale of the charged land is less than the amount due to the chargee, the chargor shall pay to the chargee the difference between the amount due and the amount so realized. **So the personal liability of the chargor is only to the extent of the balance of the amount due** (cl 8). It

> is quite clear that upon reading the annexure as a whole both the chargee and the chargor are bound by the terms and conditions of the charge and to realize the amount owing, the land must be sold in accordance with the provisions of the National Land Code 1965 ('NLC'). If the amount realized from the sale is not sufficient to cover the amount due then it is implied that a separate action may be taken against the debtor/chargor to recover the balance should he fail to pay the chargee the difference. (emphasis added.)

An editorial note to the report shows that an appeal to the Supreme Court was dismissed. However, no reasons were produced by that court for its decision. So, we are really in no position to discover why the Supreme Court dismissed the plaintiff's appeal. Before we state our views on the correctness of the *ratio* in *Hong Kong & Shanghai Banking Corp v. Wan Mohd bin Wan Ngah* we must discuss the other authority relied upon by counsel for the applicants. It is *Tan Kong Min v. Malaysian National Insurance Sdn Bhd* [2005] 3 CLJ 825.

[5] In that case, the respondent insurance company had lent money to the appellant who had provided security for that loan by way of a registered charge over his land. The appellant defaulted in making payment of the loan. The insurance company then instituted foreclosure proceedings and had the land sold off at a public auction. But the monies it got from the sale were insufficient to satisfy the debt owed to it. So, it commenced an action to recover the shortfall. The appellant took the point that the action was barred by limitation. His failure to comply with that demand constituted a breach of the contract contained in the annexure to the charge. More than six years had passed since that breach. The lender could not therefore recover the shortfall. These arguments were rejected by this court which held *inter alia* that the relevant period of limitation was 12 years and not six years. It then made the following observations upon which the present applicants place much reliance:

> At the risk of repetition, we would reiterate that the personal liability of the appellant as chargor is in respect of the difference between the amount due under the housing loan and the amount realised from the sale of the said land only and the cause of action against the appellant is only complete upon the conclusion of the sale of the said land. Indeed, if a suit is brought against the

chargor before the completion of the foreclosure action and the determination that there is a balance still owing, such a suit could be struck off as being premature.

...

As is the case here, where the respondent is also a chargee of the property and the only terms that bind the parties are the terms set out in the annexure to the charge, the respondent is not entitled at law and in equity to proceed by way of a civil suit before first realizing the security under the charge. The proper mode of recovery is to proceed by way of foreclosure and if there arises any difference to the amount due after deducting the amount realised from the sale, a separate action should be taken against the chargor on his personal liability to recover the balance.

[6] In arriving at these conclusions, this court relied on the decision in *Hong Kong & Shanghai Banking Corp Ltd v. Wan Mohd Wan Ngah* and the case of *Leong Yick Realty Co Sdn Bhd v. Asia Commercial Finance (M) Sdn Bhd* [1994] 2 CLJ 530 which followed it. However, the attention of this court was not drawn to the later decision in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 where this court held as follows:

Now, it is trite that a chargee/creditor may pursue any or all remedies to recover monies lent by him. He may enforce his statutory charge against the chargor by way of proceedings *in rem* under s. 256 of the Code. He may sue the principal debtor (who may or may not be the chargor) upon the personal covenant contained in any loan agreement that was entered into between the parties. He may proceed against the surety who has guaranteed the loan. **And he may pursue all of these courses simultaneously, contemporaneously or successively.** See *China and South Sea Bank Ltd v. Tan* [1989] 3 All ER 839 at p 842. (emphasis added.)

[7] It is clear from the statement of facts in *Tan Kong Min v. Malaysian National Insurance Sdn Bhd* that the only points in the case that called for decision were (i) when the insurance company's cause of action to recover the shortfall arose and (ii) which period of limitation was to be applied, that is, the six years prescribed by s. 6 or the 12 years prescribed by s. 21 of the Limitation Act 1953. The observation "where the respondent is also a chargee of the property and the only terms that bind the parties are the terms set out in the annexure to the charge, the

A respondent is not entitled at law and in equity to proceed by way of a civil suit before first realizing the security under the charge" is pure *obiter dicta* and not part of the *ratio decidendi*. It is not to be treated as binding authority. At the risk of repetition, *Tan Kong Min* was an action to recover a shortfall that had occurred after B the sale of the security. It was not an action for the recovery of a debt due from the borrower to the lender. As for *Hong Kong & Shanghai Banking Corp Ltd v. Wan Mohd bin Wan Ngah*, it was clearly overtaken by the decision of this court in *Low Lee Lian v. Ban Hin Lee Bank Bhd* and must be now regarded as overruled. C It is of interest to note that Lamin PCA was a member of this court in *Low Lee Lian* and subscribed to a view that was at variance with that he had expressed in *Wan Mohd Wan Ngah*'s case.

D **[8]** We would reiterate that a lender is entitled to pursue all remedies available against a borrower simultaneously, contemporaneously or successively to recover the money lent unless there is an agreement to the contrary. Such an agreement is not to be implied from a clause in an annexure to a charge in terms of cls. 8 and E 16 in the present instance. All that a clause in those terms does is to create a right in the lender to recover the balance outstanding in the event that a sale of the charged property produces a shortfall. It is not an agreement by the instant respondent bank to postpone its right to bring an action *in* F *personam* for the recovery of the whole sum lent (together with interest) until after the charged land has been sold. If the courts were to read such an agreement into the clauses in question it would amount to an unwarranted restriction on a lender's rights to seek the remedies open to it. The fallacy of the contrary G argument is revealed by asking the question: what if the land can never be sold despite all attempts to do so? It would mean that the borrower would get away scot-free from making any payment because his answer to any action by the lender upon the covenant to pay would be that it is a condition precedent that the land be H sold and a shortfall produced before any suit may be instituted. The want of logic in that proposition is sufficient to demonstrate that it is not common sense and certainly not the common law.

[9] The applicants also argue that the annexure to each charge is the only contract between the parties and the respondent bank I has no alternative but to follow its terms and resort to enforcing

the security before suing on the debt. With respect this submission is devoid of merit. There are two contracts of loan here evidenced by two letters of offer the terms of which were accepted by the borrowers. The letters are both dated 18 June 1982. One is in respect of an overdraft and the other for a term loan. These letters contain terms that are not to be found in the respective annexures. They therefore stand independently as separate contracts of debt for the breach of which the respondent brought its action as it was indeed entitled to do.

[10] We would conclude as follows. The decisions relied upon by the applicants do not really assist it. We therefore found this to be a case manifestly unsuitable for the grant of leave. The applications were accordingly dismissed. By agreement of counsel, costs were fixed at RM7,500 per application. The deposits in court were ordered to be paid out to the respondent to account of fixed costs.